

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Applications of Ameritech Corp., Transferor, and )  
SBC Communications Inc., Transferee, For )  
Consent to Transfer Control of Corporations )  
Holding Commission Licenses and Lines Pursuant )  
to Sections 214 and 310(d) of the Communications )  
Act and Parts 5, 22, 23, 25, 63, 90, and 101 of the )  
Commission's Rules )

CC Docket No. 98-141

SBC's Obligations Under the Commission's )  
Pronto Modification Order )  
)

**SBC'S APPLICATION FOR REVIEW  
OF AN INTERPRETATION BY THE ENFORCEMENT  
BUREAU OF SBC'S OBLIGATIONS UNDER THE COMMISSION'S  
PRONTO MODIFICATION ORDER OR IN THE ALTERNATIVE FOR WAIVER OF  
THE COMMISSION'S PRONTO MODIFICATION ORDER**

Pursuant to Commission Rule 1.115 (47 C.F.R. § 1.115), SBC Communications Inc. ("SBC") hereby seeks review of an interpretation made by the Enforcement Bureau of one of SBC's substantive obligations under the Commission's September 8, 2000, *Pronto Modification Order*.<sup>1</sup> Specifically, SBC requests that the Commission review and reverse the Enforcement Bureau's interpretation that the *Pronto Modification Order* requires that SBC provide additional collocation space not only in "huts and [controlled environment vaults] using a NGDLC architecture that supports both POTS and xDSL services" deployed since September 15, 2000,

<sup>1</sup> Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Second Memorandum Opinion and Order* FCC 00-336 (September 8, 2000)("Pronto Modification Order").

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but in *all* huts and controlled environment vaults containing NGDLC, *regardless of whether the NGDLC architecture actually supports both POTS and xDSL services*. The Enforcement Bureau's interpretation is inconsistent with the plain language of the *Pronto Modification Order's* collocation conditions and its underlying purpose and intent, and provides no public benefit.

The Commission has not had prior occasion to address the scope of the requirement in its *Pronto Modification Order* that SBC provide additional collocation space in remote terminal huts and controlled environment vaults ("CEVs") containing NGDLC equipped to provide xDSL services. The Enforcement Bureau's interpretation thus involves questions of law and policy that have not previously been resolved by the Commission (47 C.F.R. § 1.115(b)(2)(ii)). Moreover, the interpretation of the Enforcement Bureau is in conflict with established Commission policy (47 C.F.R. § 1.115(b)(2)(i)) and rests upon erroneous findings of important and material questions of fact (47 C.F.R. § 1.115(b)(2)(iv)). For these reasons, the Commission should review and reverse the Enforcement Bureau's interpretation of the *Pronto Modification Order*.

In the event the Commission does not reverse the interpretation of the Enforcement Bureau, SBC requests, pursuant to the Commission Rule 1.3 (47 C.F.R. § 1.3), that the Commission waive the provisions of the *Pronto Modification Order* at issue. The requirements serve only to increase SBC's costs, without any commensurate public benefit. Indeed, despite having incurred substantial cost to increase collocation space in its huts and CEVs containing NGDLC equipped to provide xDSL services, no advanced services competitor has collocated in a single one of those huts or CEVs. Thus, waiver of the increased collocation requirements will serve the public interest better than strict adherence to those requirements.

## I. BACKGROUND

- **The SBC/Ameritech Merger.**

On October 6, 1999, the Commission approved the merger of Ameritech Corporation and SBC.<sup>2</sup> During the course of the Commission's review of the prospective merger, SBC and Ameritech proposed a set of voluntary commitments for the Commission's consideration, including a commitment requiring that the merged company provide specifically defined advanced services solely through a separate advanced services affiliate. In its order approving the merger, the Commission concluded that a separate advanced services affiliate would mitigate any potential risk of discrimination faced by competing advanced services providers and would accelerate the deployment of advanced services.<sup>3</sup>

Accordingly, the Commission adopted the separate advanced services affiliate commitment as a condition of its approval of the proposed merger.<sup>4</sup> That condition specifically required that the advanced services affiliate would own and operate all new equipment used to provide advanced services (as defined in the merger conditions) and placed into service by the merged company after 30 days following the merger closing date.<sup>5</sup>

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<sup>2</sup> Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, FCC 99-279 (October 8, 1999)(“SBC/Ameritech Merger Order”).

<sup>3</sup> *SBC/Ameritech Merger Order* ¶¶ 3, 4, 60-62, 196, 207, 211, 441, 444.

<sup>4</sup> *SBC/Ameritech Merger Order* ¶ 584; Appendix C ¶¶ 1-13.

<sup>5</sup> *SBC/Ameritech Merger Order* Appendix C ¶ 3.d.

- **The Pronto Modification Order.**

After the merger closed, SBC requested an interpretation, waiver, or modification of the separate advanced services affiliate merger condition, in order to allow SBC's incumbent LEC companies to own and operate certain equipment. Specifically, SBC requested permission for its incumbent LEC companies to own and operate ADSL Digital Line Unit ("ADLU") plug-in cards and Optical Concentration Devices ("OCDs"). With its request, SBC offered — as an additional voluntary commitment — to provide additional collocation space in certain specified types of huts and CEVs deployed after September 15, 2000.

On September 8, 2000, the Commission approved SBC's request. The Commission did so after determining that:

competing providers of advanced services will receive quantifiable assurances that they will be able to access SBC's remote terminals and compete for consumers served through remote terminals. In this way, SBC's commitment should ensure that competing carriers will be able to offer consumers other types of DSL service through equipment deployed in the remote terminals of SBC's incumbent LECs.<sup>6</sup>

The Commission thus conditioned its approval on the provision of additional collocation space in huts and CEVs. That additional collocation requirement is set forth in ¶ 5(b)(1) of Appendix A of the *Pronto Modification Order*, which provides:

As to future deployed SBC/Ameritech incumbent LEC huts and CEVs using a NGDLC architecture that supports both POTS and xDSL services, after September 15, 2000, the SBC/Ameritech incumbent LECs will deploy these structures (which generally serve 2000 or more lines) so that approximately 20% of the space that can be used to install equipment in those structures for telecommunications carriers will be made available to all telecommunications carriers under the Commission's collocation rules without the need for a [Special Construction Arrangement].<sup>7</sup>

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<sup>6</sup> *Pronto Modification Order* ¶ 34.

<sup>7</sup> *Id.*

The phrase “huts and CEVs using a NGDLC architecture that supports both POTS and xDSL services” in ¶ 5(b)(1) lies at the heart of this dispute.

- **The Audit and the Enforcement Bureau’s Interpretation.**

During the course of the 2000 and 2001 audits conducted to ensure compliance with the *SBC/Ameritech Merger Order* and the *Pronto Modification Order*,<sup>8</sup> SBC and the FCC Audit Staff had different understandings concerning the scope of, and the appropriate audit procedures to test compliance with, SBC’s obligation to make available additional collocation space in certain huts and CEVs. FCC Audit Staff proposed to include *all* huts and CEVs installed on or after September 15, 2000, within the scope of the audit, while SBC proposed that the scope of the audit should include only those huts and CEVs installed on or after September 15, 2000, and actually equipped to provide xDSL services.

The Enforcement Bureau requested that SBC submit its request for interpretation in writing to the Enforcement Bureau. In its request, SBC set forth its understanding, based on the language of the *Pronto Modification Order*, that the scope of the increased collocation condition included only huts and CEVs equipped to provide xDSL services.<sup>9</sup> The Enforcement Bureau rejected SBC’s interpretation.<sup>10</sup> While apparently relinquishing its position that the *Pronto Modification Order* requires additional collocation space in *all* huts and CEVs deployed by SBC

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<sup>8</sup> One of the other commitments offered by SBC and adopted in the *SBC/Ameritech Merger Order* as a condition of the Commission’s approval of the SBC/Ameritech merger is the conduct of an audit each calendar year to evaluate SBC’s compliance with all of the conditions in the *SBC/Ameritech Merger Order*. FCC Audit Staff has insisted that the scope of the audit required under the *SBC/Ameritech Merger Order* includes the increased collocation condition in the *Pronto Modification Order*.

<sup>9</sup> Letter from Jim Lamoureux, Senior Counsel, SBC Communications, Inc. to Anthony Dale, Assistant Division Chief, Investigations & Hearings Division, Enforcement Bureau, FCC (July 15, 2002). See *Attachment A*.

<sup>10</sup> Letter from Maureen F. Del Duca, deputy Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to Jim Lamoureux, Senior Counsel, SBC Communications Inc. (August 29, 2002)(“EB Letter”). See *Attachment B*.

after September 15, 2000, the Enforcement Bureau nonetheless concluded that SBC is required under the *Pronto Modification Order* to provide additional collocation space in all huts and CEVs “containing all NGDLC deployed after September 15, 2000.”<sup>11</sup> The Enforcement Bureau thus interpreted the phrase, “huts and CEVs using a NGDLC architecture that supports both POTS and xDSL services” as meaning “all huts and CEVs containing NGDLC.”

The Enforcement Bureau’s interpretation is inconsistent and in conflict with the actual language of Appendix A of the *Pronto Modification Order*. Its interpretation, moreover, is contrary to the underlying rationale and purpose for which the Commission adopted the conditions set forth in its *SBC/Ameritech Merger Order* and its *Pronto Modification Order*. It also is fundamentally inconsistent with the documentary history of SBC’s voluntary commitments preceding the Commission’s adoption of those commitments in its *Pronto Modification Order*. For these reasons, SBC requests that the Commission reverse the Enforcement Bureau’s interpretation.

## II. DISCUSSION

### ♦ **The Enforcement Bureau’s Interpretation is Inconsistent and in Conflict with the Plain Meaning of ¶ 5(b)(1).**

The phrase “using a NGLDC architecture that supports both POTS and xDSL services” delineates precisely those huts and CEVs in which SBC must provide additional collocation space. Under the Enforcement Bureau’s interpretation of that phrase, SBC must provide additional collocation space in all huts and CEVs containing NGDLC deployed after September 15, 2000.<sup>12</sup> The Enforcement Bureau thus effectively eliminates the words “that supports both POTS and xDSL services” from ¶ 5(b)(1).

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<sup>11</sup> *EB Letter* at 3.

<sup>12</sup> *Id.* at 3.

The Enforcement Bureau's interpretation violates the fundamental canon that a legal provision must be interpreted so as to give meaning to all words and phrases in that provision. *Cf. Lin Qi-Zhuo v. Meissner*, 70 F.3d 136, 138 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage."). Clearly, the phrase "that supports both POTS and xDSL services" is a limitation on the broader universe of all "huts and CEVs using a NGDLC architecture." The Enforcement Bureau's interpretation eviscerates that limitation.

The Enforcement Bureau apparently premised its interpretation on the mistaken assumption that all NGDLC supports both POTS and xDSL services. As the phrase in ¶ 5(b)(1) reflects, however, that is simply not the case. While NGDLC, at its most basic level, may be defined as a DLC system designed for use with SONET transport facilities,<sup>13</sup> additional equipment is required (*i.e.* ADLU Cards and Channel Bank common cards and system software) for NGDLC equipment to become part of an architecture that actually supports both POTS and xDSL services. Numerous carriers, including SBC, deploy NGDLC solely in connection with the provision of voice services.<sup>14</sup>

The Enforcement Bureau suggests that its interpretation is correct by defining "supports" as meaning "is compatible with or suitable for."<sup>15</sup> Even its redefinition, however, does not support the Enforcement Bureau's interpretation. The fact is that NGDLC is not compatible with

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<sup>13</sup> *Pronto Modification Order* ¶ 4 n. 10.

<sup>14</sup> The magnitude of potential of costs to provide additional collocation space in these huts and CEVs has not been determined. Even at some sites where SBC has deployed NGDLC that is not equipped to support xDSL services, SBC has installed huts and CEVs that may comply with the 20% additional collocation space required by ¶ 5(b)(1). It is nonetheless imperative that the Commission clarify the requirements of its *Pronto Modification Order*, both so that SBC can avoid in the future any unnecessary collocation costs and to eliminate the possibility of any potential future enforcement actions or disputes.

<sup>15</sup> *EB Letter* at 2.

or suitable for the provision of both POTS and xDSL services until additional equipment (*i.e.*, ADLU cards and Channel Bank common cards and system software) is installed. Indeed, the Enforcement Bureau agrees that this is the case.<sup>16</sup>

The Enforcement Bureau nonetheless concludes that “The fact that a hut using NGDLC may need plug-in cards and other equipment does not change its fundamental nature; it is still a hut using ‘a NGDLC architecture that supports both POTS and xDSL services.’”<sup>17</sup> That conclusion is nothing more than circular reasoning. It also is inconsistent with inclusion of the terms “using” and “architecture” in ¶ 5(b)(1). “Using,” indicates that additional collocation space must be provided only in those huts and CEVs which are equipped—not those which may be equipped in the future—to provide both POTS and xDSL services. Moreover, NGDLC is only one component of an “NGDLC architecture” that supports both POTS and xDSL services. Other components specifically include the ADLU cards and Channel Bank common cards and system software. *See Pronto Modification Order* ¶ 4. Thus, huts and CEVs “using an NGDLC architecture that supports both POTS and xDSL services” must properly be read to mean huts and CEVs containing NGDLC in which SBC has installed ADLU cards for the provision of xDSL services.

♦ **The Enforcement Bureau’s Interpretation is Incompatible with the Purpose and Rationale of the SBC/Ameritech Merger Order and the Pronto Modification Order.**

One of the purposes of the separate advanced services affiliate condition in the *SBC/Ameritech Merger Order* was to “create a powerful incentive for SBC to solve the problems of limited space in remote terminals, as well as other technical issues related to competitive

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<sup>16</sup> *EB Letter* at 2 (the *Pronto Modification Order* “recognized that additional equipment (*e.g.*, plug in cards) may be necessary for a specific unit to realize its full potential.”)

<sup>17</sup> *Id.*



access to remote terminals.”<sup>18</sup> The separate advanced services affiliate condition created this incentive by prohibiting SBC from providing access to remote terminals to its advanced services affiliate “without also providing equivalent access to unaffiliated carriers.”<sup>19</sup>

SBC’s subsequent request to modify the separate advanced services affiliate condition was very narrow and specific. It was limited to ownership and operation of ADLU plug-in cards and OCDs for the provision of xDSL services. Similarly, the concern of the Commission was limited to the effect the waiver might have on the purpose underlying the separate advanced services affiliate requirement. Specifically, with respect to collocation, the Commission was concerned that waiving the separate affiliate requirement might undermine the incentive created by the separate affiliate condition to provide sufficient remote terminal collocation space for competing advanced services providers.<sup>20</sup>

The purpose of the collocation condition was thus tied specifically to SBC’s ownership and operation of ADLU cards in the provision of xDSL services. Indeed, in approving the additional collocation requirement, the Commission determined that “SBC’s commitment should ensure that competing carriers will be able to offer consumers *other types of DSL service* through equipment deployed in remote terminals.”<sup>21</sup> It is thus clear that the Commission was focused on the ability of advanced services providers to compete with SBC in its provision of xDSL services. SBC, however, can only provide such services at those NGDLC sites at which SBC has installed ADLU cards. The additional collocation requirement should, therefore, apply

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<sup>18</sup> *Pronto Modification Order* ¶ 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Pronto Modification Order* ¶ 16.

<sup>21</sup> *Pronto Modification Order* ¶ 34. (Emphasis added.)

only to NGDLC in remote terminals in which SBC incumbent LECs own and operate ADLU cards in connection with the provision of xDSL services.<sup>22</sup>

♦ **The Enforcement Bureau's Interpretation is Inconsistent and in Conflict with the Documentary Record of the Origin of the Additional Collocation Requirement.**

The additional collocation requirement resulted from the voluntary commitments made by SBC in conjunction with its request that the Commission interpret, waive, or modify the separate advanced services affiliate requirement in the *SBC/Ameritech Merger Order*. SBC's commitment did not encompass *all* huts and CEVs containing NGDLC. Rather, the documentary history leading up to SBC's submission of its voluntary commitments confirms that the language incorporated in ¶ 5(b)(1) was designed to limit SBC's obligation to huts and CEVs containing NGDLC equipment to provide xDSL services.

In the letter from SBC initiating the Commission's consideration of this issue, SBC made clear that the questions it posed to the Commission pertained specifically to an "analysis of how *Project Pronto assets* should be allocated between the incumbent LECs and Advanced Services affiliates."<sup>23</sup> In particular, SBC acknowledged possible concern with physical space limitations of "upgraded or new Remote Terminals ('RTs')."<sup>24</sup> To address that concern, SBC informed the FCC that, "[a]s to newly placed *Pronto CEVs and huts*, the SBC incumbent LECs are currently

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<sup>22</sup> Moreover, the separate advanced services affiliate condition from the *SBC/Ameritech Merger Order* still applies to all huts and CEVs in which SBC had not deployed NGDLC equipped to provide xDSL services. There is thus no reason whatsoever under the rationale of the *SBC/Ameritech Merger Order* to require SBC to provide additional collocation in huts and CEVs containing NGDLC that is not equipped to provide xDSL services.

<sup>23</sup> February 15, 2000, letter from Paul K. Mancini, Vice President and Assistant General Counsel, SBC Communications Inc., to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission at 2. (Emphasis added.)

<sup>24</sup> *Id.*

planning for additional space than would be required to meet their own needs, in order to create additional potential space for some unaffiliated and affiliated CLECs for collocation purposes.”<sup>25</sup>

Thus, from the very beginning, the issue of collocation space in huts and CEVs related solely to SBC’s Project Pronto deployment. Accordingly, SBC’s offer was specifically and unequivocally limited to collocation space in “newly placed *Pronto CEVs and huts*.”<sup>26</sup> SBC never suggested that it would or should increase collocation in non-Pronto huts and CEVs.

In its Reply Comments filed on March 10, 2000, SBC was very clear that, “[w]here *Project Pronto requires* construction of new controlled environmental vaults and huts, they will be built with additional space in an effort to accommodate collocation by both affiliated and unaffiliated carriers, in addition to the SBC incumbent LEC.”<sup>27</sup> Indeed, SBC was also very clear that the added collocation space in huts and CEVs would come specifically as a “benefit from Project Pronto,” rather than from SBC’s general deployment of NGDLC huts and CEVs.<sup>28</sup> This is fully consistent with SBC’s description three months later of its commitment to increase collocation space in Project Pronto huts and CEVs. In a June 2, 2000, letter from Mr. Mancini to Ms. Matthey, SBC once again was very clear and explicit that it was agreeing to “voluntarily sizing new *Project Pronto huts and controlled environmental vaults* specifically to provide

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<sup>25</sup> *Id.* (Emphasis added.)

<sup>26</sup> *Id.* (Emphasis added.)

<sup>27</sup> *Reply Comments of SBC Communications Inc. In Support of A Determination that SBC Incumbent LECs May Own Combination Plugs/Cards and Optical Concentration Devices*, CC Docket No. 98-141, at 14 n. 10 (Mar. 10, 2000) (emphasis added).

<sup>28</sup> *Id.* at 14.

extra space for future collocators,”<sup>29</sup> and this commitment to build additional space applied “*where Project Pronto requires* construction of new huts and controlled environmental vaults.”<sup>30</sup>

On July 13, 2000, in a letter from Ms. Hill-Ardoin to Mr. Strickland, SBC submitted its formal offer of Voluntary Commitments to address comments filed in response to SBC’s February 15, 2000, request for interpretation, waiver, or modification. SBC specifically limited its commitment to increase collocation space to future-deployed ILEC huts and CEVs “using a NGDLC architecture that supports both POTS and xDSL services.” SBC used the term “using a NGDLC architecture that supports both POTS and xDSL services” in its formal offer in order to provide a more functional description of the Project Pronto remote terminals described to date in correspondence with the FCC. This clarifying language, however, in no way changes the fact that SBC’s commitment to increase collocation space was limited to Project Pronto huts and CEVs.

Nor should there be any doubt that the Commission’s adoption of SBC’s commitment as a condition of the Commission’s *Pronto Modification Order* reflects any obligation beyond SBC’s commitment. The Commission has made clear in its various merger orders those instances in which it intends to revise the terms of voluntary commitments offered by SBC. Nowhere in the *Pronto Merger Condition Order* does the Commission ever state any intent to alter SBC’s commitment to provide additional collocation space only in Project Pronto huts and CEVs, as reflected in the phrase “using a NGDLC architecture that supports both POTS and xDSL services.” Nor does it posit any suggestions that SBC’s offer to set aside space only in

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<sup>29</sup> Letter from Paul K. Mancini, Vice President and Assistant General Counsel, SBC Telecommunications, Inc., to Carol E. Matthey, Deputy Chief, Common Carrier Bureau, Federal Communications, June 2, 2000, at 6. (Emphasis added.)

<sup>30</sup> *Id.* at 10.

Project Pronto remote terminals might not be sufficient to address any concerns the Commission might have with respect to collocation space for advanced services competitors. Consequently, there is no basis to conclude that the Commission deliberately intended to alter SBC's merger commitment or that the reference in the order to huts and CEVs "using a NGDLC architecture that supports both POTS and xDSL services" means anything other than huts and CEVs containing NGDLC which is equipped to provide xDSL services.

### III. REQUEST FOR WAIVER

In the alternative, in the event the Commission does not reverse the interpretation of the Enforcement Bureau, SBC requests, pursuant to Commission Rule 1.3, that the Commission waive the requirements of Paragraph 5(b)(1) of Appendix A. Requiring SBC to provide additional collocation space in huts and CEVs containing NGDLC which is not equipped to provide xDSL services would do nothing more than require SBC to spend additional capital, with virtually no offsetting benefits. To date, *no CLEC* has collocated in any of the huts and CEVs in which SBC has increased the amount of collocation space. Indeed, *no CLEC* has even submitted a legitimate request for collocation in any of the huts and CEVs in which SBC has increased the amount of collocation space.<sup>31</sup> It would be highly inefficient and wasteful for SBC to incur yet more substantial costs to add additional collocation space in the face of continued disinterest in that space.

In this instance, waiver of the requirement would certainly better serve the public interest than strict adherence to the requirement. *See Northeast Cellular Tel. Co., L.P. v FCC*, 897 F.2d, 1164, 1166 (D.C. Cir. 1990). Waiver is particularly warranted in this instance given the

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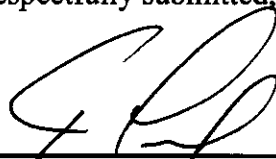
<sup>31</sup> Although several requests have been submitted for collocation in such huts and CEVs, each such request was, in fact, not intended to request collocation in a hut or CEV. In addition, although SBC has spent over \$148 million through July 2002, in connection with the conditions in the *Pronto Modification*

important public interest in the provision of broadband services, the financial strain caused by deploying additional equipment to provide those services, and the prospect of more effective implementation of broadband deployment if the requirements are waived. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

#### IV. CONCLUSION

It is clear from the plain language, intent and purpose of the Commission's Order that SBC's obligation to provide additional collocation space applies only to huts and CEVs containing NGDLC equipped to provide xDSL services. Accordingly, the Commission should reverse the interpretation of the Enforcement Bureau. In the alternative, the Commission should waive the provision of the *Pronto Modification Order* requiring SBC to provide additional collocation space in huts and CEVs. Waiver would better serve the public interest than strict adherence to the requirement.

Respectfully submitted,



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September 30, 2002

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*Order* relating to SBC's request to own and operate OCDs, only SBC's advanced services affiliate is purchasing SBC's wholesale broadband offering.

# Attachment A



July 15, 2002

**Via Facsimile and First Class Mail**

Anthony J. Dale, Esq.  
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Investigations and Hearing Division  
Enforcement Bureau  
Federal Communications Commission  
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**Re: Agreed Upon Audit Procedure 14**

Dear Mr. Dale:

For the past several months, SBC and FCC Audit Staff have been engaged in discussions concerning the scope of, and the appropriate audit procedures to test compliance with, SBC's commitment in the *Pronto Merger Condition Order* to make available additional collocation space in certain future-deployed remote terminals. See *SBC/Ameritech Merger Order*, 14 FCC Rcd. 14712 (1999) and the *Pronto Merger Condition Order*, 15 FCC Rcd. 17521, Appendix A, para. 5(b) (2000) ("Pronto RT Condition").<sup>1</sup> In these discussions, Staff has proposed that the scope of Procedure 14 include *all* remote terminals installed on or after January 1, 2001, while SBC has proposed that it include only Project Pronto terminals installed on or after January 1, 2001.<sup>2</sup> SBC believes that its proposed Procedure 14 more accurately reflects the letter and spirit of the SBC's commitment and the *Pronto Merger Condition Order*, and therefore urges the FCC Audit Staff to accept SBC's proposed Procedure 14.

The history surrounding the Pronto RT Condition, requiring SBC to "upscale" certain remote terminals, confirms SBC's understanding of its obligations. As part of the voluntary

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<sup>1</sup> The *Pronto Merger Condition Order* granted SBC modifications of certain conditions of the *SBC/Ameritech Merger Order*, to allow SBC's ILECs to own certain equipment, specifically, ADSL Digital Line Unit ("ADLU") Cards and Optical Concentration Devices ("OCDs") deployed in connection with SBC's Project Pronto.

<sup>2</sup> Procedure 14 addresses SBC's obligation to provide additional collocation space in certain remote terminals.



commitments SBC offered in support of its request for modification of certain conditions contained in the *SBC/Ameritech Merger Order*, SBC agreed to provide additional space in or adjacent to Project Pronto remote terminals specifically to permit CLEC collocation in those remote terminals. This is reflected in the Voluntary Commitments appended to the Commission's *Pronto Merger Condition Order*, which reflect that for "future deployed" huts and controlled environmental vaults ("CEVs") "using a NGDLC architecture *that supports both* POTS and xDSL services," SBC will ensure that "20% of the space that can be used to install equipment in those structures for telecommunications carriers will be made available to all telecommunications carriers under the Commission's collocation rules without the need for a special construction arrangement." *Pronto Merger Condition Order*, 15 FCC. Rcd. 17558 (emphasis added).<sup>3</sup>

SBC's offer to "upsized" the amount of collocation space available in certain remote terminals, and the Commission's acceptance thereof, thus was very specific. It did not encompass all DLC remote terminals, or even all NGDLC terminals. Rather, it was limited to remote terminals using a NGDLC architecture that supports both POTS and xDSL services. In other words, it was limited to Project Pronto remote terminals.

This conclusion is fully supported by the record leading up to the Commission's *Pronto Merger Condition Order*. In the letter from SBC initiating the Commission's consideration of this issue, SBC made clear that the questions it posed to the Commission pertained specifically to an "analysis of how Project Pronto assets should be allocated between the incumbent LECs and Advanced Services affiliates." February 15, 2000, letter from Paul K. Mancini, Vice President and Assistant General Counsel, SBC Communications Inc., to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission at 2. In particular, SBC acknowledged possible concern with physical space limitations of "upgraded or new Remote Terminals ('RTs')." *Id.* To address that concern, SBC informed the FCC that, "[a]s to newly placed *Pronto CEVs and huts*, the SBC incumbent LECs are currently planning for additional space than would be required to meet their own needs, in order to create additional potential space for some unaffiliated and affiliated CLECs for collocation purposes." *Id.* (Emphasis added.)

Thus, from the very beginning, the issue of collocation space in huts and CEVs related solely to SBC's Project Pronto deployment, and SBC's offer to increase collocation space was made to address that specific issue. Accordingly, SBC's offer was limited to collocation space in "newly placed *Pronto CEVs and huts*." *Id.* (Emphasis added.) There was never any indication of any broader issue as to non-Pronto DLC or NGDLC remote terminals, and SBC never suggested that it would or should increase collocation in non-Pronto DLC or NGDLC remote terminals.

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<sup>3</sup> The same "using a NGDLC architecture that supports both POTS and xDSL services" language appears in the requirement for cabinets. The conclusion as to the proper scope of Procedure 14 is thus the same for huts and CEVs as well as for cabinets.

In its Reply Comments filed on March 10, 2000, SBC similarly was very clear that, “[w]here *Project Pronto* requires construction of new controlled environmental vaults and huts, they will be built with additional space in an effort to accommodate collocation by both affiliated and unaffiliated carriers, in addition to the SBC incumbent LEC.” *Reply Comments of SBC Communications Inc. In Support of A Determination that SBC Incumbent LECs May Own Combination Plugs/Cards and Optical Concentration Devices*, CC Docket No. 98-141, at 14 n. 10 (Mar. 10, 2000) (emphasis added). Indeed, SBC was very clear that the added collocation space in huts and CEVs would come specifically as a “benefit from *Project Pronto*,” rather than from SBC’s general deployment of DLC and NGDLC huts and CEVs. *Id.* at 14. This is fully consistent with SBC’s description three months later of its commitment to increase collocation space in *Project Pronto* huts and CEVs. In a June 2, 2000, letter from Mr. Mancini to Ms. Mattey, SBC once again was very clear that it was agreeing to “voluntarily sizing new *Project Pronto* huts and controlled environmental vaults specifically to provide extra space for future collocators,” (page 6)(emphasis added) and this commitment to build additional space applied “*where Project Pronto* requires construction of new huts and controlled environmental vaults.” (Page 10.)(Emphasis added.)

On July 13, 2000, in a letter from Ms. Hill-Ardoin to Mr. Strickland, SBC submitted a formal offer of Voluntary Commitments to address comments filed in response to SBC’s July 15, 2000, letter. SBC specifically limited its commitment to increase collocation space to future-deployed ILEC remote terminals “using a NGDLC architecture that supports both POTS and xDSL services,” or, in other words, *Project Pronto* remote terminals. SBC used the term “using a NGDLC architecture that supports both POTS and xDSL services” in its formal offer to provide a more functional description of *Project Pronto* remote terminals consistently described throughout the proceeding.<sup>4</sup>

The record thus leaves no doubt that SBC’s obligation under the *Pronto Merger Condition Order* to increase collocation space in certain remoter terminals is limited to *Project Pronto* remote terminals. Any other reading of SBC’s obligation is incompatible with the original purpose for which SBC sought modification of certain conditions in the *SBC/Ameritech Merger Order* in the first place. The requirement to increase collocation space in remote terminals “using a NGDLC architecture that supports both POTS and xDSL services” simply can not be read to include remote terminals other than *Pronto* remote terminals and still remain consistent with the record in the proceeding.

In the *Pronto Merger Condition Order*, the Commission described SBC’s commitment as pertaining to “all huts and CEVs for use by unaffiliated carriers.” *Pronto Merger Condition Order* at ¶ 34. That, however, is merely a high level, summary description of SBC’s commitment. In the Ordering Clauses of the *Pronto Merger Condition Order*, the Commission is clear that the specific obligations imposed on SBC are contained in Appendix A to the *Pronto*

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<sup>4</sup> SBC did so to avoid controversy concerning its commitment in case it changed the name “*Project Pronto*.”

*Merger Condition Order*, which contains the more specific and limited obligation to provide increased collocation space only in huts and CEVs using a NGDLC architecture that supports both POTS and xDSL services, *i.e.*, Project Pronto huts and CEVs. *Pronto Merger Condition Order* ¶ 61. Appendix A is consistent with SBC's July 13<sup>th</sup> *ex parte*, in which SBC made clear that its proposed commitment was limited to future deployed remote terminals using a NGDLC architecture that supports both POTS and xDSL services, *i.e.*, Project Pronto remote terminals. Interpreting the *Pronto Merger Condition Order* to require SBC to "upscale" all remote terminals would violate common rules of construction because it would suggest that the Commission intended to include inconsistent provisions in the same document.

Moreover, the Commission has made clear in its various merger orders those instances in which it intends to revise the terms of voluntary commitments offered by SBC. Nowhere in the *Pronto Merger Condition Order* does the Commission ever state any intent to alter SBC's commitment to provide additional collocation space only in remote terminals using a NGDLC architecture that supports both POTS and xDSL services. Nor does it offer any explanation why SBC's offer to set aside space only in Project Pronto remote terminals might not be sufficient to address any concerns the Commission might have. Consequently, there is no basis to conclude that the Commission deliberately intended to alter SBC's merger commitment or that the reference in the order to "all huts and CEVs," rather than just Project Pronto huts and CEVs, was anything more than an oversight.

Indeed, interpreting the *Pronto Merger Condition Order* to require SBC to provide additional collocation space in all remote terminals would be inconsistent with the overall spirit of the *Pronto Merger Condition Order*. The Commission is quite clear that it is SBC's Project Pronto, and the Commission's concerns about certain aspects of Project Pronto, that precipitated the *Pronto Merger Condition Order*. See *Pronto Merger Condition Order* ¶¶ 4-5. Moreover, the Commission makes clear that the underlying purpose of the additional collocation space requirement is to mitigate any dis-incentives to make collocation available on a non-discriminatory basis that might be created by removing the separate affiliate requirement for certain equipment as requested by SBC. *Pronto Merger Condition Order*, ¶¶ 16, 33. Since such equipment is associated only with Project Pronto, any possible dis-incentive would be limited to Project Pronto remote terminals. It is, therefore, impossible to interpret the additional collocation requirement of the *Pronto Merger Condition Order* as encompassing any remote terminals other than Project Pronto remote terminals.

Requiring SBC to provide additional collocation space in non-Project Pronto remote terminals would do nothing more than add substantial costs to SBC's Project Pronto initiative, with virtually no offsetting benefits. SBC has spent over \$50 million to add additional space in its Project Pronto huts and CEVs, but CLECs thus far have not generally used that space. It would be highly inefficient and wasteful for SBC to incur yet more costs to add additional collocation space in non-Project Pronto remote terminals in the face of CLECs' obvious disinterest in that space.

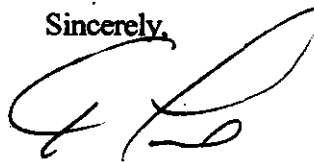
Finally, some on the Staff have suggested that all "NGDLC" remote terminals can support POTS and xDSL services, and therefore that SBC should provide additional collocation space in non-Pronto huts and CEVs. Aside from being inconsistent with the letter, history, and spirit of the Commission's *Pronto Merger Condition Order*, such an interpretation can not be squared with the facts of SBC's Project Pronto NGDLC deployment. "NGDLC architecture that supports both POTS and xDSL services," is not the same thing as NGDLC. Not all NGDLC equipment supports both voice and xDSL services.

While NGDLC, at its most basic level, may be defined as a DLC system designed for use with SONET transport facilities,<sup>5</sup> additional equipment is required (such as ADLU Cards and OCDs) for NGDLC equipment to become part of an architecture that actually supports both voice and xDSL services. Indeed, SBC has installed NGDLC equipment in its remote terminals--including equipment from the same manufacturer of SBC's Project Pronto equipment--that does not support both POTS and xDSL services. As a technical and factual matter, "huts and CEVs using NGDLC architecture that supports both POTS and xDSL services" only can be read to mean Project Pronto huts and CEVs.

In short, based on the record of the proceeding, the letter and spirit of the Commission's *Pronto Merger Condition Order*, and the technical and factual details of SBC's Project Pronto NGDLC deployment, it is clear that SBC's obligation to provide additional collocation space in remote terminals applies only to Project Pronto remote terminals. Accordingly, the proper scope of Procedure 14 should be limited to Project Pronto remote terminals.

Thank you very much for your consideration, and we look forward to your response. Please contact me if you have any questions regarding this matter, or if you wish to discuss it further.

Sincerely,



Jim Lamoureux  
Senior Counsel

cc: Hugh Boyle  
Maureen Del Duca  
Sheryl Herauf  
Mark Stephens  
Mark Stone

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<sup>5</sup> *Pronto Merger Condition Order* ¶ 4 n. 10.

# Attachment B



Federal Communications Commission  
Washington, D.C. 20554

August 29, 2002

Mr. Jim Lamoreux  
Senior Counsel  
SBC Communications, Inc.  
1401 H St., N.W.  
Suite 400  
Washington, DC 20005

Dear Mr. Lamoreaux:

This letter addresses SBC Communications Inc.'s ("SBC") July 15, 2002 request for interpretation concerning the separate affiliate requirements adopted in the *SBC/Ameritech Merger Order* and subsequently modified in the *Pronto Modification Order*.<sup>1</sup> We reiterate here the requirement in the *Pronto Modification Order* that SBC's incumbent local exchange carriers ("LECs") make additional space available in certain remote terminals using Next Generation Digital Loop Carrier ("NGDLC") architecture.

After a series of discussions with Bureau staff, SBC requested staff's interpretation of certain merger conditions arising out of the *Pronto Modification Order*. In the *Pronto Modification Order*, the Commission modified the separate affiliate conditions of the *SBC/Ameritech Merger Order* to permit SBC's incumbent local exchange carriers ("LECs") to own and operate certain equipment otherwise prohibited by the *SBC/Ameritech Merger Order*. The Commission modified its original determination in the *SBC/Ameritech Merger Order* based on certain additional conditions, including a requirement that SBC's incumbent LECs provide additional collocation space in their remote terminals.<sup>2</sup> In particular, the Commission required SBC's incumbent LECs to make available additional collocation space in all huts and CEVs deployed after September 15, 2000.<sup>3</sup>

SBC contends that the relevant condition in the *Pronto Modification Order*, i.e., the requirement to provide additional collocation space in remote terminals, applies only to what SBC calls "Project Pronto terminals."<sup>4</sup> SBC presents five reasons for its interpretation. Specifically, SBC argues that:

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<sup>1</sup> Letter from Jim Lamoreux, Senior Counsel, SBC Communications, Inc. to Anthony Dale, Assistant Division Chief, Investigations & Hearings Division, Enforcement Bureau, FCC (July 15, 2002) ("*SBC July 15, 2002 Letter*").

<sup>2</sup> The requirement to make available additional collocation space applied to three types of remote terminals: (i) huts, which are above-ground structures; (ii) controlled environmental vaults ("CEVs"), which are below-ground structures; and (iii) cabinets, which are small above-ground housings for all types of digital loop carrier systems. See *Pronto Modification Order* at paras. 33-37.

<sup>3</sup> *Id.* at para. 34(a).

<sup>4</sup> See *SBC July 15, 2002 Letter* at 1.

- (1) the collocation space requirement must be read consistent with SBC's *ex parte* submissions in the proceeding that distinguish between "Project Pronto" and "non-Project Pronto" remote terminals;<sup>5</sup>
- (2) the plain language of the voluntary commitments that states that SBC must make available additional collocation space in remote terminals "using a NGDLC architecture that supports both POTS and xDSL services" limits SBC's obligation only to those remote terminals with the equipment needed to provide both POTS and xDSL services;<sup>6</sup>
- (3) the Commission would have clearly revised the "terms of voluntary commitments offered by SBC" in *Pronto Modification Order* had it meant to do so;<sup>7</sup>
- (4) a reading of the space requirement that would impose the additional space condition on more than just the "Project Pronto" terminals would violate the "overall spirit" and purpose of the *Pronto Modification Order*;<sup>8</sup> and
- (5) some NGDLC is not, as a matter of fact, capable of "support[ing] both POTS and xDSL services."<sup>9</sup>

Based on these arguments, SBC believes that it must only make additional collocation space available in a subset of huts and CEVs, i.e., those it refers to as "Pronto huts and CEVs." This position is incorrect.

The plain language of the order and its conditions states that SBC must make available additional collocation space in all "huts and CEVs using a NGDLC architecture that supports both POTS and xDSL services" and are deployed after September 15, 2000.<sup>10</sup> We agree with SBC that we should read the language of paragraph 34 of the order with this language from Appendix A. But SBC's construction of Appendix A is overly restrictive. SBC effectively construes "supports" to mean architecture that *SBC uses to provide* both POTS and xDSL services.<sup>11</sup> This construction is inconsistent with the plain language and the specific equipment examples in the *Pronto Modification Order*. The term "NGDLC architecture that supports both POTS and xDSL services" refers to NGDLC architecture that is compatible with or suitable for a combined POTS-xDSL offering, and it is not limited to NGDLC architecture that SBC currently and actually uses for a combined POTS-xDSL offering, as SBC urges. In fact, the *Pronto Modification Order* recognized that additional equipment (e.g., plug-in cards) may be necessary for a specific NGDLC unit to realize its full potential.<sup>12</sup> The fact that a hut using NGLDC may

<sup>5</sup> See *id.* at 1-3.

<sup>6</sup> *Id.* at 2-3, 5.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Pronto Modification Order* at Appendix A, para. 5(b)(1); para. 34.

<sup>11</sup> See SBC's second argument *supra*.

<sup>12</sup> See *Pronto Modification Order* at n.34.

need plug-in cards and other equipment does not change its fundamental nature; it is still a hut using "a NGDLC architecture that supports both POTS and xDSL services." Because the language of Appendix A is fully consistent with paragraph 34, SBC's argument that the Commission failed to indicate an express departure in the order from SBC's offering is misplaced.<sup>13</sup> There was no such departure. Finally, the terms "Project Pronto remote terminals" and "non-Project Pronto remote terminals" appear nowhere in the *Pronto Modification Order*, and, in any event, SBC has failed to establish that there is any ascertainable distinction between those two terms or even to offer any viable definition of them. They simply cannot serve as a basis for assessing SBC's compliance.<sup>14</sup> The plain language of the conditions and order requires SBC to make additional collocation space available in huts and CEVs containing *all* NGDLC deployed after September 15, 2000.<sup>15</sup>

SBC's arguments about the spirit of the agreement<sup>16</sup> and the language of its *ex parte* submissions to the Commission<sup>17</sup> do not alter our view of the controlling nature of the plain language of the order and its conditions. We not persuaded that SBC's *ex parte* descriptions of its commitments and the "history" of the proceeding may govern our analysis. The plain language of the conditions and the Commission's adopting order, not SBC's statements proffered during the proceeding, control SBC's obligations. Moreover, to the extent that the "overall spirit" of the order is relevant to interpreting its plain language, we find no inconsistency. The overall spirit of the order was to "enable competing carriers to provide advanced services in SBC's territory" while relaxing the *SBC/Ameritech Merger Order*'s equipment ownership requirement.<sup>18</sup> Applying the collocation requirement to all NGDLC architecture capable of supporting both POTs and xDSL services serves the Commission's goal by affording SBC's competitors the opportunity to provide advanced services out of SBC remote terminals. By contrast, SBC's interpretation would limit that opportunity.

SBC must make additional collocation space available in huts and CEVs containing *all* NGDLC deployed after September 15, 2000. With respect to the effect of this interpretation on the forthcoming audit reports, the independent auditor should apply this interpretation, but may disclose SBC's interpretation in the same paragraph.

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<sup>13</sup> See SBC's third argument *supra*.

<sup>14</sup> In fact, SBC has indicated that its "non-Project Pronto remote terminals" will be using the same equipment deployed in its "Project Pronto remote terminals" and addressed in the *Pronto Modification Order*, i.e., the Alcatel Litespan and AFC UMC-1000 products. See *Pronto Modification Order* at n.37.

<sup>15</sup> To the extent SBC argues that some NGDLC architecture is simply incapable of supporting both POTs and xDSL, see SBC's fifth argument *supra*, it has made no showing to support such a contention or to allow us to limit the category of NGDLC architecture that is subject to the collocation requirement.

<sup>16</sup> See SBC's fourth argument *supra*.

<sup>17</sup> See SBC's first argument *supra*.

<sup>18</sup> See *Pronto Modification Order* at para. 1.



Please feel free to contact me if you have any additional questions. You may also contact Mr. Mark Stone of my staff at (202) 418-0816.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Del Duca", with a horizontal line extending to the right.

Maureen F. Del Duca  
Deputy Chief  
Investigations and Hearings Division  
Enforcement Bureau

CC: Ernst & Young, LLP